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**2004 Wis Eth Bd 01**  
**IMPROPER USE OF OFFICE**

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¶1 You have asked how a charitable Foundation may supplement the salary of the Director of a state agency whose work the Foundation raises funds to support. Supplementing the Director's salary is precisely what the Foundation should not do. *Wisconsin Statutes* declare as a felony a public official's or employee's acceptance "for the performance of any service or duty anything of value which the officer or employee knows is greater or less than is fixed by law." §946.12 (5), *Wisconsin Statutes*. The issue is whether, consistent with his duties to the state agency, will the Director have the time to take on a second job with the Foundation and will the compensation for that second job be commensurate with the responsibilities.

¶2 The best legal authority of which I am aware on the issue you have raised is the Attorney General's letter dated November 9, 2000 addressed to the President of the University of Wisconsin System. In that letter the Attorney General indicated that an arrangement along the lines you have asked about is legally permissible only if care is taken to address certain matters.

¶3 The Attorney General wrote:

If the UW Foundation were paying the Chancellor for his or her fundraising activities when those activities are generally included within the Chancellor's traditional duties, a reasonable fact-finder could conclude that the arrangement violated Wis. Stat. § 946.12 (5). If, however, the arrangement with the UW Foundation required the new Chancellor to perform services beyond those which UW chancellors have traditionally performed, and if the contract clearly required services beyond those traditional services, it is unlikely that the contract would be found to violate Wis. Stat. § 946.12 (5).

¶4 We would have thought that prior directors' responsibilities included raising funds for the benefit of the state agency. We are not in a position to conclude that the duties you propose for the new director differ substantially in nature or degree from the duties of his or her predecessors. Before proceeding with the course about which you have asked, the agency should verify that it will be able to document at the outset and throughout the life of the agreement that the director's responsibilities to the Foundation are in fact significantly beyond those traditionally associated with the agency's Director.

¶5 In addition, provisions of the Ethics Code also bear on the issue about which you have asked.

¶6 *Use of office to obtain donations for a private organization.* State law forbids the agency's Director to use the position of Director to obtain financial gain or anything of significant value for an organization of which the Director is an authorized representative or agent. §§19.42 (2) and 19.45 (2), *Wisconsin Statutes*. This means that if the Director relies on the title or prestige or resources of his position with the agency to obtain financial contributions to the Foundation, the Director must be able to demonstrate either (a) that he or she is not acting on behalf of the Foundation or (b) that the contributions are used solely for the benefit of the state agency, not the benefit of the Foundation.

¶7 Although a recital in an agreement between the Foundation and the Director that the Director may not represent himself or herself as an authorized representative or agent of the Foundation may be evidence of the parties' intent, the true test will be the facts. Quite frankly, it seems to us difficult to establish that the Foundation could pay the Director to engage in "major donor cultivation and solicitation" without the Director's being the Foundation's agent.

¶8 Alternatively and more realistically, the Director should be able to demonstrate that donations he or she raises are for the sole benefit of the state agency and are not used for the Foundation's operating expenses, including overhead or the costs of the Director's compensation. One way to document this might be to create a segregated fund for the philanthropic campaign for which the Director's services are being contracted. In this way an impartial observer may fairly conclude that the Director's actions are in accord with §19.45 (2) because the Foundation, although a temporary custodian for the receipt and transfer of funds to the agency, derives from the Director's efforts nothing for the private benefit of the Foundation or its employees.

¶9 *Use of office to obtain employment.* State law forbids the agency's Director to use the position of Director to obtain financial gain or anything of significant value for his or her private benefit. §§19.42 (1), 19.45 (2), *Wisconsin Statutes*. However, §19.45 (1), *Wisconsin Statutes*, provides that the Ethics Code "does not prevent any state public official from accepting other employment or following any pursuit *which in no way interferes with the full and faithful discharge of his or her duties to the state.*" (Emphasis added).

¶10 In order to comply with §19.45 (2), as modified by §19.45 (1), the Director should be in a position to demonstrate both: (a) that accepting

employment with the Foundation does not interfere with the full and faithful discharge of the Director's duties to the state and (b) that the Director is not using his or her state position to obtain a level of compensation that is greater than is commensurate with his or her duties for the Foundation. In order to do this, the following factors are important:

1. The Director's work for the Foundation should not take so much time as to interfere with the Director's responsibilities to the state agency.
2. The compensation that the Foundation pays the Director must be reasonable in light of the services that the Director renders to the Foundation.
3. The Director should not, in furtherance of his or her responsibilities to the Foundation, take an action antagonistic to the agency's interest or use the agency's resources, not normally available to anyone, to further an interest of the Foundation's that is not in furtherance of the interests of the state agency. The Director should be neither a member of the Foundation's board of directors nor have any responsibility for the supervision of the Foundation's director or staff unless and except as it is clear both to the agency and to the Foundation that the Director's role is to represent exclusively the interests of the agency.
4. The Director and Foundation should regularly document the work that the Director performs for the Foundation and spends on the Foundation's behalf. The Attorney General, in his letter dated November 9, 2000, stressed the importance of this action; we take this opportunity to concur and to add our own admonition to this effect.